United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

77-2131

To be argued by
ALAN R. NAFTALIS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-2131

JAMES HEIMERLE,
Petitioner-Appellant,

—v.—

UNITED STATES OF AMERICA,
Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-2131

JAMES HEIMERLE,
Petitioner-Appellant,

—v.—

UNITED STATES OF AMERICA,
Respondent-Appellee.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

James F. Heimerle appeals from an order of the Honorable Charles L. Brieant, United States District Judge, entered in the United States District Court for the Southern District of New York on July 6, 1977, denying a motion made by Heimerle pursuant to Title 28, United States Code, Section 2255, to dismiss Indictment 72 Cr. 1331 and to vacate his conviction thereon.

On December 3, 1976 appellant Heimerle moved pursuant to 28 U.S.C. § 2255, for an order vacating a sentence previously imposed upon him, permitting him to withdraw his plea of guilty to Count 2 of Indictment 72 Cr. 1331, and dismissing the Indictment. He based his application on the Interstate Agreement on Detainers Act, 18 U.S.C. Appendix (Pub. L. 91-538, §§ 1-8, Dec. 9, 1970) ("the Act"). On December 15, 1976, the

Honorable Charles L. Brieant issued a memorandum and order pursuant to Heimerle's § 2255 application.*

The United States subsequently petitioned Judge Brieant for reconsideration of his memorandum and order of December 15, 1976. On July 6, 1977, Judge Brieant issued a memorandum and order on reargument denying Heimerle the relief he sought in his motion of December 3, 1976. From this order Heimerle appeals.

Statement of Facts

On December 6, 1972 an indictment was filed in the Southern District of New York charging the defendants Joseph Calise and James F. Heimerle with violations of Title 18, United States Code, §§ 1341 and 371. The court docket indicates that on January 24, 1973, Edward A. Panzarella, Esq. filed a Notice of Appearance on Heimerle's behalf. (H. App. 1).** On March 19, 1973 Heimerle was brought by way of a Writ of Habeas Corpus Ad Prosequendum before the District Court for arraignment and pleaded not guilty. The writ was satisfied and he was returned to state custody. Heimerle was brought by a separate writ for a court proceeding concerning voice exemplars dated March 23, 1973. This writ was satisfied on March 30, 1973. Heimerle's trial was then adjourned to September 24, 1973 on May 18, 1973. The defendant was produced in the Southern

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* The Court issued this memorandum and order without the benefit of the filing of a response by counsel for the United States. The absence of response to the Heimerle application arose from the failure of Heimerle to serve copies of his "Notice of Motion" upon the United States, despite the implication in his papers that he had complied with that requirement of Rule 5(a) F.R.C.P.

** Citations to "G. App." refer to the Government's separate appendix. Citations "H. App." refer to Heimerle's appendix.

District of New York for trial on September 24, 1973, and the writ was adjourned to September 26, 1973. The writ was satisfied on September 26, 1973. The trial date was postponed at that time, because Heimerle at his own initiative replaced his counsel with Gary R. Sunden, Esq., who filed a Notice of Appearance on September 26, 1973. (H. App. 3).

A further writ was filed March 5, 1974, returnable March 8, 1974, but not executed until March 22, 1974. (G. App. 8). This writ was adjourned to April 5, 1974 and satisfied on that date. Jerome L. Merin, Esq., counsel for the United States, who executed the affidavit for the writ, stated that the writ was sought because it was "necessary that the defendant appear and confer with counsel in order to enter prepare for trial." (G. App. 7).

On July 8, 1974, a writ was issued returnable on July 22, 1974. (G. App. 11). The writ was adjourned to July 23, 1974, when it was satisfied. On July 22, 1974, Heimerle pleaded guilty to Count 2 of Indictment 72 Cr. 1331, and on July 23, 1974, the Court imposed a sentence of 4 years probation to commence upon his release from confinement pursuant to his conviction on Indictment 72 Cr. 1330.

On December 24, 1975, Heimerle was released from confinement pursuant to 72 Cr. 1330, and at that time began his probation sentence pursuant to 72 Cr. 1331.

On December 3, 1976, Heimerle filed a motion pursuant to 28 U.S.C. § 2255 for a withdrawal of his plea and a dismissal of Indictment 72 Cr. 1331. The defendant never served the Government with any notice or copies of his moving papers. On December 15, 1976, the Honorable Charles L. Brieant, Jr. issued an order and memorandum granting the relief Heimerle requested. (H. App. 16).

The Government requested the opportunity to file papers with Judge Brieant in opposition to those previously filed by Heimerle. This application was granted by Judge Brieant. On reargument, the court in a memorandum and order dated July 6, 1977, denied Heimerle's motion on the grounds that his guilty plea waived any rights he may have had under the Agreement. (H. App. 22).

ARGUMENT

A Claimed Violation of the Interstate Agreement on Detainers May Not be Raised by a Motion Under Title 28, United States Code, Section 2255.*

In the District Court, the Government contended that a claimed violation of the Interstate Agreement on Detainers may not be raised for the first time on collateral attack by means of a motion pursuant to Title 28, United States Code, Section 2255. In none of his opinions on the matter did Judge Brieant address the issue, but rather denied Heimerle the relief he sought on the grounds that his guilty plea waived any rights he may have had under the Agreement. At the time of his ruling, this Court had not addressed the issue; indeed, in the only decision involving the invocation of the Agreement on collateral attack, the Court had expressly reserved the question, and decided the case on other grounds. *United States* v. *Chico*, 558 F.2d 1047, 1049, n.6 (2d Cir. 1977).

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* This Court has pending two appeals raising almost identical issues. *Heimerle* v. *United States*, Dkt. No. 77-2119; *Enright* v. *United States*, Dkt. No. 77-2133. These appeals will be argued on January 24, 1978. The Argument section of this brief is virtually identical to the Argument sections of the *Heimerle* and *Enright* briefs.

Since Judge Brieant's decision, however, this Court has expressly ruled that a claim under the Agreement cannot be raised for the first time on collateral attack. *Edwards* v. *United States*, Dkt. No. 77-2048, slip op. 123 (2d Cir., October 25, 1977). The *Edwards* decision is absolutely dispositive of this appeal, and we rely primarily upon it.

The facts in *Edwards* do not differ in any significant respect from the facts here. Edwards, like Heimerle, was indicted for violations of federal crimes at a time when he was already in the custody of New York State on state charges. Prior to trial on the federal charges, he was brought on at least one occasion to the United States Courthouse in Foley Square and returned to state custody, in conceded violation of Art. IV(e) of the Act, as interpreted by this Court in *United States* v. *Mauro*, 544 F.2d 588 (2d Cir. 1976), *cert. granted*, 46 U.S.L.W. 3183 (Oct. 4, 1977) and *United States* v. *Ford*, 550 F.2d 732 (2d Cir. 1976), *cert. granted*, 46 U.S.L.W. 3183 (Oct. 4, 1977).*

Heimerle, like Edwards, subsequently pleaded guilty to the federal charges against him. More than a year after his conviction, Edwards claimed for the first time that the violation of Art. IV(e) of the Act required the dismissal of the indictment and the vacation of his conviction. Judge Metzner, who had presided at Edwards' guilty plea and who entertained the Section 2255 motion, denied the motion. He ruled that while a claim under the Agreement might be raised on collateral

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* The Government continues to believe that both *Mauro* and *Ford* were wrongly decided. However, since the Supreme Court has indicated that it will resolve the question of whether and the extent to which the Agreement governs the federal government's use of a writ of *habeas corpus ad prosequendum*, we are not at this time asking this Court to reconsider its previous decisions. See *United States* v. *Edwards*, *supra*, slip op. at 125, n.1.

attack, Edwards had waived his claim by pleading guilty.* On appeal, this Court expressly declined to adopt the reasoning of Judge Metzner; rather, it is stated "[w]hile we have no quarrel with the ground on which Judge Metzner placed his decision, we think it preferable to affirm on the broader basis that a claim based on a violation of the IAD is not within 28 U.S.C. § 2255." Slip op. at 125. After reviewing the requirements for Section 2255 relief framed by the Supreme Court in *Hill* v. *United States*, 368 U.S. 424, 428 (1962) and *Davis* v. *United States*, 417 U.S. 333, 346 (1974), and considering recent decisions of this Court finding relief pursuant to Section 2255 inappropriate under facts more "appealing" than those presented by Edwards, see *Alfano* v. *United States*, 555 F.2d 1128 (2d Cir. 1977); *Del Vecchio* v. *United States*, 556 F.2d 106 (2d Cir. 1977), the Court concluded that a claimed violation of the Act did not constitute a "complete miscarriage of justice" or an "exceptional circumstance." Slip op. 127. Thus, it affirmed the denial of Edwards' motion.

Edwards is indistinguishable from this case, and on its authority the order of the District Court should be affirmed.

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* Judge Metzner clearly considered the difference between a guilty plea and a conviction after trial to be of considerable significance in determining the availability of subsequent relief under Section 2255. In a separate case, he has vacated a conviction after trial because of a violation of the Agreement, even though the defendant never raised the Agreement claim at trial, on appeal, or any time prior to filing a motion pursuant to Section 2255. *United States* v. *Enright*, 77 Civ. 449 (S.D.N.Y., Sept. 14, 1977). The Government is appealing the *Enright* decision, Dkt. No. 77-2133, since the subsequent *Edwards* decision is inconsistent with and dispositive of it as well. In any event, since Heimerle, like Edwards, pleaded guilty without raising the issue, he is foreclosed from raising the issue on collateral under both the views of Judge Metzner and that of the *Edwards* Court.

CONCLUSION

The order of the District Court should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

ALAN R. NAFTALIS,
FREDERICK T. DAVIS,
Assistant United States Attorneys,
Of Counsel.

Form

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279 - Affidavit of Service by Mail

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

Alan Robert Naftalis being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 26th day of January, 1978 he served 2 copies of the within Respondent's Brief and Appendix by placing the same in a properly postpaid franked envelope addressed:

James F. Heimerle
PMB 01873
Atlanta Georgia 30315

An deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing at One St. Andrew's Plaza, Borought of Manhattan, City of New York.

Alan Robert Naftalis

Sworn to before me this
26th day of January 1978

Gloria Meyer

GLORIA MEYER
Notary Public, State of New York
No. 31-0535340
Qualified in New York County
Commission Expires March 30, 1979